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IN THE

Supreme Court of the United States.

ORIGINAL JURISDICTION.

OCTOBER TERM, 1925.

STATE OF WISCONSIN, STATE OF MINNESOTA, STATE OF OHIO, STATE OF PENNSYLVANIA,

Complainants,

vs.

STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,

Defendants.

Bill in Equity
Original Jurisdiction.
No. 7

PETITION OR MOTION OF THE STATE OF KENTUCKY, BY FRANK E. DAUGHERTY, ITS ATTORNEY GENERAL, FOR LEAVE TO INTERVENE AND BECOME A PARTY DEFENDANT, TO FILE A MOTION TO DISMISS THE AMENDED BILL AND TO OTHERWISE PARTICIPATE IN THE DEFENSE.

FRANK E. DAUGHERTY,
Attorney General of Kentucky;
DANIEL N. KIRBY;
Solicitors for the State of Kentucky.

J. W. Steele & Co., Printers, 101-103 S. Seventh St., St. Louis, Mo.

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STATE OF WISCONSIN, STATE OF MINNESOTA, STATE OF OHIO, STATE OF PENNSYLVANIA, Complainants, vs. STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, Defendants.	Bill in Equity Original Jurisdiction. No. 16.

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The State of Kentucky by Frank E. Daugherty, its Attorney General, respectfully states, that:

(1) Frank E. Daugherty, Attorney General of the State of Kentucky, duly authorized to appear in any proceeding

or tribunal in which the interests of said state are involved,—on behalf of said state respectfully presents this petition for leave to the State of Kentucky to intervene and become a defendant in the above entitled cause, and to file therein the motion to dismiss the amended bill therein, a copy of which motion accompanies this petition.

(2) Said cause is a suit in equity, wherein the states of Wisconsin, Minnesota, Ohio and Pennsylvania, as joint complainants against the State of Illinois and the Sanitary District of Chicago, as defendants, seek to invoke the original jurisdiction of this Honorable Court for the purposes:

(a) Of enjoining the defendants from diverting any water whatever from Lake Michigan into the "Lakes-To-The-Gulf" water-way, which water-way consists of the Chicago River that opens into Lake Michigan, the canal of the Sanitary District of Chicago that connects the Chicago River with the Des Plaines River, and the Des Plaines, Illinois and Mississippi Rivers.

(b) Of asking this Honorable Court to usurp the powers and functions that this Court has held to be vested in the Secretary of War, acting upon the recommendation of the Chief of Engineers, in respect of the navigable waters of the United States, by determining and decreeing in this cause, what quantity of water to be diverted from Lake Michigan "is reasonably required for the purpose of navigation" in said "Lakes-To-The-Gulf" water-way;

and by enjoining all such diversion of water in excess of the quantity so to be determined by this Honorable Court; and

(c) Of asking this Honorable Court, by its decree herein, to exercise control over the navigable condition of said water-way, by enjoining the injection into the Chicago, Des Plaines and Illinois Rivers of such sewage or waste as would render them unsanitary for navigation, and to do so at the request of complainant states, none of which are located upon or below the said rivers alleged to be polluted.

(3) The State of Kentucky is located in the Mississippi Valley, with the center of the Mississippi River as the western boundary of a part of said state, and said state and the people thereof are respectively interested in the subject matter of said cause, and would be prejudiced by the granting of the relief therein prayed by complainants in respect of the diversion of water from Lake Michigan into the "Lakes-To-The-Gulf" water-way—a part of the navigable waters of the United States.

(4) The State of Kentucky, and the inhabitants of said state are interested in the subject matter and issues of said cause in two respects, to-wit: first, in respect of the navigability of said water-way; and second, in respect of the protection from dangerous pollution, of that part of said water-way which borders the State of Kentucky and constitutes the water supply of many of the communities and people of said state.

(5) There are many individuals, partnerships and corporations residing within the State of Kentucky and doing business at various points in said state, who are shippers and receivers of freight via said "Lakes-To-The-Gulf" water-way, who have developed their respective businesses and industries, and have heretofore conducted and are now conducting the same, relying upon the assumptions: that the navigable channel that has for many years constituted the said public highway or water route between Lake Michigan and the Gulf of Mexico would forever be maintained as a navigable water route with an adequate flow of water, part of which is necessary to be diverted for said purpose from Lake Michigan into said water-way; and that the quantity of water necessary to be so diverted for said purpose would not at any time be permitted by the United States to be substantially lessened to the prejudice or impairment of the navigability of said water route, nor so as to prevent the same from being kept adequate to meet the constantly growing needs of the common carriers by water and of the shippers and receivers by freight, doing business in the State of Kentucky and in other parts of the Mississippi Valley who may wish to use said route as a highway of interstate commerce.

(6) The State of Kentucky is informed and believes, and upon information and belief avers the fact to be, that for many years last past, to-wit, more than fifteen years, the water so diverted as aforesaid from Lake Michigan through said "Lakes-To-The-Gulf" water-way, has constituted more than one-fourth of the low water flow in the Mississippi River at St. Louis, and that if such diver-

sion were to be discontinued, there are many points in the Mississippi River between Grafton, Illinois, and Cairo, Illinois, where the low water navigable depths would be thereby reduced at least one foot and a half; and that any material reduction in said diversion would correspondingly interfere with navigation throughout said "Lakes-To-The-Gulf" water-way, including several points in the Mississippi River in the States of Kentucky, Missouri and Tennessee, above Memphis; and the State of Kentucky avers, that the relief sought by the complainants in the above entitled cause to enjoin and prevent the lowering of the levels of the navigable waters in which said complainants claim as riparian owners to have some title or interest, would necessarily inflict upon the State of Kentucky to a much greater extent, the same kind of injury in respect of which said complainants seeks relief in the above entitled cause.

(7) On, to-wit, March 3, 1925, after the decision by this Honorable Court on January 5, 1925, in the case of Sanitary District v. United States (266 U. S. 405), the Secretary of War, upon the recommendation of the Chief of Engineers, has (pursuant to the power held by said decision to have been vested in him by the "Rivers and Harbors Act" of Congress of 1899), granted a permit to the defendant Sanitary District of Chicago, to divert (upon certain stated conditions), from Lake Michigan into and through the said canal that constitutes a part of said water-way, "an annual average diversion of not to exceed 8500 cubic feet per second, the instantaneous maximum not to exceed 11,000 cubic feet per second." The granting of said permit appears upon the face of said amended bill.

(8) Since the granting of said permit, and pursuant thereto, the defendant Sanitary District of Chicago, has been continuing to divert water from Lake Michigan into said water-way, but within the quantity specified in said permit, and it is this diversion, thus lawfully authorized by the United States, that said amended bill seeks to enjoin.

(9) The development and maintenance of this water-way from Lake Michigan to the Gulf of Mexico, has long been a subject of public consideration and of great public importance to the United States, particularly to the states and their peoples, in and tributary to the Mississippi Valley, whose commerce is served by it.

By the "Federal Control Act" of Congress (40 Stat. L. 451), the President of the United States was authorized to spend such amounts as he deemed necessary for the utilization of waterways and the creation of water transportation agencies; and the policy of the Congress to encourage inland water transportation services and facilities, was declared in Section 500 of the "Transportation Act" of 1920 (41 Stat. L. 499); and by Section 201 of said Act, the Federal facilities for such transportation, that had been acquired pursuant to the Federal Control Act, were transferred to the Secretary of War, who was directed to operate the same. Thereafter and pursuant thereto, the Secretary of War successfully operated a barge line freight service on the Mississippi River from St. Louis to New Orleans, and on the Black Warrior River in Alabama, which barge line was known as the "Mississippi-Warrior Barge Line." This service was sub-

sequently taken over by the "Inland Waterways Corporation," organized pursuant to an Act of Congress entitled "An Act to create the Inland Waterways Corporation for the purpose of carrying out the mandate and purpose of Congress as expressed in Section 201 and 500 of the Transportation Act and for other purposes," approved June 3, 1924. Said "Inland Waterways Corporation" now operates such barge line, and in the fiscal year ending June 30, 1925, it earned a gross revenue of $3,339,542.00, and carried on the Mississippi River, approximately 100,000 tons of freight per month, a substantial part of which freight moved to or from points in the State of Kentucky.

(10) The President of the United States has recommended the maintenance and development of this waterway, in a recent message to the Congress.

(11) The Department of War of the United States has long been proceeding with its work of river improvement and channel maintenance in the critical portion of said "Lakes-To-The-Gluf" channel, i. e. between St. Louis, Missouri, and Cairo, Illinois, upon the correct assumption that at least a nine foot channel between said points is necessary for the reasonable needs of navigation.

(12) The State of Kentucky is informed and believes, and upon information and belief avers the fact to be, that the said quantities of diversion allowed by said permit, when supplemented by certain engineering works of channel improvements that said War Department has planned, and for the carrying out of which it is dependent upon congressional appropriations, will be reasonably adequate for the need of navigation.

(13) If said permitted diversion should be wholly enjoined, or substantially diminished in quantity, as said complainants seek by their amended bill to do, then the navigability of said water-way would be substantially impaired and obstructed, to the prejudice of the State of Kentucky and of many of its inhabitants who use said water-way.

(14) The pendency of said suit, while the same remains undetermined, questioning, as it seeks to do, the power of the Secretary of War to permit said diversion,—constitutes an obstacle in the way of prompt congressional action in accord with the said recommendations of the President's Message for the development and maintenance of said water-way, and it is therefore of public importance that as speedy a determination as possible be had of the legal questions presented by said suit, which was filed by the State of Wisconsin as sole complainant on, to-wit, June 5, 1922, and, although it involved matters of great public importance, was thereafter permitted by said state to slumber until quite recently.

(15) The water constituting said water-way is now used, and for many years has been used, with the knowledge of the United States, for the further purpose—incident to its existence as a public navigable water-way route —of carrying off the sewage of the City of Chicago and the surrounding territory. The volume of said water constituting said water-way, is now adequate for said purposes of navigation and sanitation by the addition thereto of the water now being diverted from Lake Michigan pursuant to said permit, and with the aid of said

water thus diverted said sewage matter has heretofore been sufficient diluted so as not to cause injury to the health of the people of Kentucky.

(16) So long as said water-way continues to be used for said additional purpose of sanitation, water to be diverted from Lake Michigan will continue to be needed to dilute said sewage matter and to render it less harmful to the health of the persons who live along said water-way, including the inhabitants of the State of Kentucky, whose health would be endangered if the diversion of said water should be enjoined as prayed for in said amended bill.

(17) No greater quantity of water is being thus diverted than is necessary for the reasonable requirements of navigation; and if said diversion should be wholly enjoined, or should be reduced substantially below the amount that the Secretary of War upon the recommendation of the Chief of Engineers, has decided to be requisite for the needs of navigation, then the navigability of said water-way as the same exists and has for a long time heretofore existed, would be seriously impaired and obstructed; and so long as said water-way continues to be used for said additional purpose of sanitation, the health and water supplies of the communities and people located along the Mississippi River below the mouth of the Illinois River, would be seriously endangered.

(18) The State of Kentucky is advised that its presence as a party defendant would be proper, and states that if permitted to intervene as a defendant, it will attempt (by its said motion to dismiss) to show, that the amended bill in said cause is subject to challenge on con-

trolling jurisdictional grounds, which, if held to be well founded, will result in a speedy final determination of said cause and in the removal of said suit as a further obstacle to much needed congressional action.

Wherefore, petitioner prays that this Honorable Court will grant leave to petitioner to file this its petition for leave to intervene as a party defendant to said cause, and for an order making it a defendant therein, and for leave to file its motion to dismiss which accompanies this petition, and for leave thereafter to participate in the defense of said cause as it may be advised; and for such other and further relief as to the Court may seem proper in the premises.

STATE OF KENTUCKY,

By Dawn E. Dawley
Attorney General of ~~Tennessee~~ Kentucky;

David Z. Hirsch.
Solicitors for the State of Kentucky.